IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
SAINT CROIX APPELLATE DIVISION

ADELBERT M. BRYAN, Appellant, v. HENRITA TODMAN, Supervisor of Elections and the St. Thomas Board, Appellee.	:	Dist. Ct. No. 1993-0005 Terr. Ct. No. 1992-113

On Appeal from the Territorial Court of the Virgin Islands,
Small Claims Division

Argued: May 26, 1993
Filed: October 29, 1993

BEFORE: **Hon. THOMAS K. MOORE, Hon. DANIEL H. HUYETT, 3RD, and Hon. HENRY SMOCK.**

APPEARANCES:

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ORDER

Bryan v. Todman, et al.,
Dist. Ct. No. 1993/0005
Terr. Ct. No. 1173/1992

This matter is before the court on appeal from the Territorial Court of the Virgin Islands;

In accordance with the Memorandum Opinion of even date;

IT IS ON THIS 29th **day of October, 1993, hereby ORDERED AND ADJUDGED that the judgment of the Territorial Court is AFFIRMED.**

DATED: 29th **Day of October, 1993**

FOR THE COURT:

THOMAS K. MOORE, CHIEF JUDGE

ATTEST: ORINN F. ARNOLD
Clerk of the Court

BY: Deputy Clerk

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS

APPELLATE DIVISION OF SAINT CROIX

ADELBERT M. BRYAN, Appellant, v. HENRITA TODMAN, Supervisor of Elections and the St. Thomas Board, Appellee.	:	Dist. Ct. No. 1993-0005 Terr. Ct. No. 1992-1173

On Appeal from the Territorial Court of the Virgin Islands

Argued: May 26, 1993
Filed: October 29, 1993

BEFORE: **THOMAS K. MOORE**, Chief Judge, District Court of the Virgin Islands; **DANIEL H. HUYETT,3RD**, Judge of the United States District Court for the Eastern District of Pennsylvania, Sitting by Designation; and **HENRY SMOCK**, Judge of the Territorial Court of the Virgin Islands, Division of St. Thomas/ St. John, Sitting by Designation.

APPEARANCES:

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JUDGMENT OF THE COURT

This is an appeal from a final judgment of the Territorial Court denying the petition of Adelbert M. Bryan ["appellant"] for (1) a TRO to restrain the certification of the November 3, 1992, general election on St. Croix; and (2) a declaratory judgment that the November 3, 1992 election is null and void, and for the order of a new election. The trial court denied the TRO as moot, and denied the request for a declaratory judgment invalidating the election and for a new election. Appellant filed a notice of appeal and then moved for reconsideration and a new trial. The motion to reconsider and for a new trial was also denied, and the trial court's denial of the motion for a new trial is included in this appeal.

Appellant presents the following questions on appeal:

> 1. Whether the trial court committed reversible error by concluding that the sections of the Virgin Islands Election Code which were concededly violated were directory and not mandatory, notwithstanding the use of the word "shall."
>
> 2. Whether it was reversible error by the trial court to conclude that appellant failed to carry his burden of showing that the irregularities and non-compliance with the statute's mandate so affected the outcome of the election as to cast

> doubt upon the integrity of the vote and as to constitute bad faith on the part of the election officials.
>
> 3. Whether the trial court abused its discretion in denying the post trial motion to reconsider its decision and grant a new trial.

Since we answer all three questions in the negative, we affirm.

I. Standard of Review.

We have appellate jurisdiction pursuant to 48 U.S.C. § 1611(a), reprinted at 1A Virgin Islands Code Ann. tit., 4, § 33.

The trial court's decision concerning the meaning of the Virgin Islands Election Law statute is subject to plenary review. *See Moody v. Sec. Pac. Business Credit, Inc.*, [find cite 1992 case]; *Manor Care, Inc., v. Yaskin*, 950 F.2d 122, 124 (3d Cir. 1991). This is so whether the issue under review has been denominated one of construction or one of interpretation. *Air Courier Conference of Am. v. U.S. Postal Serv.*, 959 F.2d 1213, 1217 n.3 (3d Cir. 1992).

"Generally, the denial of a motion for reconsideration is reviewed for abuse of discretion. However, because an appeal from a denial of a motion for reconsideration necessarily raises the underlying judgment for review, the

standard of review varies with the nature of the underlying judgment." *United States v. Herrold*, 962 F.2d 1131, 1136 (3d Cir. 1992); *see also McAlister v. Sentry Ins. Co.*, 958 F.2d 550, 553 (3d Cir. 1992). Thus, any legal issues are subject to plenary review, any factual issues are reviewed for clear error, and any issue ordinarily subject to review under the abuse of discretion standard will receive such review.

Likewise, a motion for a new trial is reviewed for abuse of discretion "unless the court's denial of the motion is based on the application of a legal precept." *Rotondo v. Keene Corp.*, 956 F.2d 436, 438 (3d Cir. 1992).

II. Facts and Procedural History.

Appellant, a senator seeking re-election, sought a TRO and other relief in the Territorial Court for various violations of the Virgin Islands election laws alleged to have occurred during the November 3, 1992 general elections held in the United States Virgin Islands. On November 3, 1992, the same day the general election was held, he filed a complaint with the St. Croix Board of Elections ["the Board"] alleging violations of the Virgin Islands election laws. On November 10, 1992, the Board took oral testimony regarding appellant's complaint, and issued a final decision on November 20, 1992, that the alleged violations of the election law did not affect the results of the November 3,

1992 election. On November 21, the St. Croix Board certified the election results showing that the St. Croix senatorial candidates received the following vote totals:

CANDIDATE	ELECTION DAY VOTES	ABSENTEE VOTES	TOTAL
Kenneth Mapp	7845	105	7951
Edgar Ross	6479	108	6587
Mary Ann Pickard	5915	71	5986
Alicia Hansen	5807	64	5871
G. Luz A. James II	5064	75	5139
Holland Redfield	5040	94	5134
L. Belardo de O'Neal	4620	62	4682
Adelbert M. Bryan	4305	50	4355
St. Claire Williams	3747	52	3799
Bent Lawaetz	3471	86	3557
John Tutein	3465	63	3528
Michael Joseph	3114	55	3169
Winfield James	3043	39	3082
Gregory Bennerson	2887	58	2945
Alicia Torres-James	2330	52	2382
Robert Acosta II	1132	18	1150
Hernando Williams	403	4	407
Almando Liburd *	5334	60	5394
Robert O'Connor Jr. *	3789	98	3887
Write-In Candidates	19	9	28

* Indicates "At-Large" Candidates.

On November 25, appellant filed this action in the Territorial Court seeking a TRO to restrain the certification of the November 3 election, or, in the alternative, declaratory judgment nullifying that election. A bench trial was held on December 7, 9 and 10, 1992, on the first day of which, the parties stipulated that:

> 1) there were no instruction models of the electronic voting machines used in the general election as required by 18 V.I.C. § 505;
>
> 2) there was an insufficient number of electronic voting machines placed at certain polling places in order to comply with provisions of 18 V.I.C. § 196(b);
>
> 3) over 1,600 voters were assigned to the Grove Place Polling district [in violation of 18 V.I.C. § 194];
>
> 4) no list of qualified voters was distributed as required by 18 V.I.C. § 4;
>
> 5) certain erroneous times appear on the printout compiled from voting tabulations of the electronic voting machines;
>
> 6) the database information was programmed in Pennsylvania using 1990 general data.

In addition to the stipulated irregularities, appellant also alleged that:

> a) many individuals, after standing in line at one polling area, were

> told after the other polling areas were closed, that their polling area had been changed thereby denying them their constitutional right to vote;
>
> b) voters were turned back and locked out at Grove Place in violation of the Voting Rights Act of 1964 and 18 V.I.C. § 555;
>
> c) voting machines were not tested, programmed nor tabulated publicly in violation of 18 V.I.C. § 506;
>
> d) no facsimile or sample ballots were available to voters or candidates in violation of 18 V.I.C § 503;
>
> e) machines were not placed on public exhibition in suitable places for 15 days in violation of 18 V.I.C. § 504;
>
> f) Shoup Corporation was allowed and/or violated the laws of the V.I. in printing out candidates without authority to do so in violation of 18 V.I.C. §§ 351, 354, 355 & 357;
>
> g) at least three candidates on the printout have the same amount of votes at two different places due to their programming of the data for printout; and
>
> h) the Board of election violated 18 V.I.C. § 627(a) by not acting timely on the results.

On December 18, 1992, the Territorial Court entered a Memorandum Opinion and Order denying relief on all appellant's

claims. The request for a TRO was denied as moot, since the action to be restrained had occurred some four days before the suit was filed. The trial court also declined to enter a declaratory judgment, finding that the violated sections of the Virgin Islands Election Law statute are directory rather than mandatory, notwithstanding the use of "shall" in the statutory language. The court further found insufficient evidence that the outcome of the election was affected by the admitted irregularities or that no confidence could be placed in the integrity of the vote. Moreover, appellant did not prove that the failure of the election officials to comply with the election laws was a result of fraud or was so substantial as to constitute bad faith. Finally, the court determined that "there was simply no evidence that any qualified voter was denied the right to vote." p.13. Indeed, appellant failed "to successfully carry his burden, . . . and to prove that a number of qualified voters, **sufficient to affect the outcome of the election**, were denied the right to vote because of the irregularities." Id. (emphasis added).

On December 21, 1992, appellant filed a notice of appeal, and on December 22, 1992, moved to reconsider and for a new trial, which was denied on January 8, 1993.

III. Discussion

A. Motion for Reconsideration and New Trial.

For ease of analysis the Court will determine the last question first. Appellant contends that the trial court abused its discretion by denying his motion for reconsideration and for a new trial. He argues that his motion was based on newly discovered evidence which, if admitted, would support a converse holding. Appellant sought to introduce what he characterizes as "two substantive pieces of new evidence": one, an affidavit in support of the testimony of one of appellant's key witnesses, Mrs. Eleanor Tranberg, who testified that she was "erroneously and illegally denied the right to vote, having voted in 1988 and 1990"; and two, "documentation from the Virgin Islands Department of Licensing and Consumer Affairs confirming that the Shoup Group was not registered to do business in the Virgin Islands." Brief of appellant at p.19. The trial court denied this motion concluding that the evidence with respect to the Shoup Group did not qualify as "newly discovered", in that it concerned facts of which appellant was not "excusably ignorant," and the other evidence was "cumulative and not of the utmost importance to his case." Order of December 17, 1993, p.3.

Under Rule 60(b)(2), FED. R. CIV. P., the term "newly discovered evidence" refers to "evidence of facts in existence at the time of trial of which the aggrieved party was excusably ignorant." *United States v. 27.93 Acres of Land*, 924 F.2d 506,

516 (3d Cir. 1991). To have been entitled to a new trial appellant was required to show that the evidence was "(1) material and not merely cumulative, (2) could not have been discovered prior to trial through the exercise of reasonable diligence, and (3) would probably have changed the outcome of the trial." *Bohus v. Beloff*, 950 F.2d 919, 930 (3d Cir. 1991); *citing Stridiron v. Stridiron*, 698 F.2d 204, 207 (3d Cir. 1983); *Ulloa v. City of Philadelphia*, 692 F. Supp. 481, 483 (E.D.Pa 1988). "The movant under Rule 60(b) 'bears a heavy burden' (citation omitted) which requires 'more than a showing of the potential significance of the new evidence.'" *Bohus*, 950 F.2d at 930. Specifically, the *Bohus* court noted that Rule 60(b) motions have been viewed by our Court of Appeals as "'extraordinary relief which should be granted only where extraordinary justifying circumstances are present.'" *Id.; Plisco v. Union R. Co.*, 379 F.2d 15, 17 (3d Cir. 1967); *see also Moolenaar v. Government of the Virgin Islands*, 822 F.2d 1342, 1346 (3d Cir. 1987).

We cannot say that the trial court abused its discretion in denying appellant's motion to reopen the proceeding on the basis of the proffered evidence. First, we are convinced that the newly discovered evidence would not have altered the outcome of the case. We agree with the trial judge that evidence

in the affidavit supporting the testimony of Mrs. Tranberg was cumulative. The evidence sought to be introduced by appellant would, if found credible, merely have buttressed her testimony. As the trial court pointed out, appellant needed to show that some 315 or more qualified voters, who would have voted for him, (the number of votes by which he lost) were similarly disfranchised by the irregularities. Such evidence would have been substantial and sufficiently significant to alter the outcome of the election and the judgment, and to warrant re-opening of the case. We also agree with the trial judge that the Shoup Group evidence could and should have been discovered earlier. Indeed, we fail to see how the excluded evidence bears upon the integrity of the vote of the electorate so as to alter the judgment. And while appellant's *pro se* status must be and was taken into consideration, it is not in and of itself an "extraordinary justifying circumstance." Thus, we conclude that the trial court properly declined to grant appellant's motion for reconsideration and a new trial.

B. Statutory Construction of Virgin Islands Elections Law.

Appellant contends that the trial court erred in the construction it gave to the statutory sections of the Virgin Islands Election Laws which were violated. He argues that the

court was required by the legislature's use of the word "shall" to interpret the provisions as mandatory and to find that the election was null and void as a result of the violations of the sections. The court found that the use of the word "shall" in the statutory scheme suggests that sections 4, 194, 196, 503-506,and 627(a) 9 through 18 (which were concededly violated), "are all directory and are intended merely to regulate the conduct of the election." Opinion at p. 8.

It is axiomatic that statutory interpretation begins with the language of the statute itself. *Pennsylvania Dept. of Pub. Welfare v. Davenport*, 495 U.S. 552, 557-58, 110 S. Ct. 2126, 2130 (1990). It is presumed that the legislature expressed its legislative intent through the ordinary meaning of the words it chose to use. The plain meaning of the words ordinarily is regarded as conclusive. However, the plain meaning rule is not absolute. A court, also, may consider persuasive legislative history that the legislature did not intend the words they selected to be accorded their common meaning. A construction inconsistent with a statute's plain meaning, however, is justifiable only when clear indications of a contrary legislative intent exists. In other words, if the statutory language is clear, a court must give it effect unless this will produce a result demonstrably at odds with the intention of the drafters.

Specifically, the sections of the statute concededly violated govern the following aspects of the electoral process:

> **18 V.I.C. § 4:** Enumerates the Powers, Duties and Functions of the Supervisor of Elections, who in turn is subject to the "direction, control and supervision of the board of elections."
>
> (Appellant claims generally that the Board of Elections "abdicated" its powers to the Supervisor of Elections, who in turn did not strictly comply with the duties and functions as stated in this section, and more specifically (1) that no list of qualified voters was distributed as required by this statute; and (2) neither the Board of Elections or the Supervisor of Elections fulfilled their statutory duty of supervised the input of the database information of qualified voters and that the programming of such information was performed in Pennsylvania using the 1990 data).
>
> **18 V.I.C. § 194:** concerns "Polling places to be fixed by election boards" and provides that "[n]o more than 800 electors shall be allotted to more than one polling place."
>
> (The 800 limit was established in 1966 when the legislature increased the electors allotted to any polling place from 500 to 800). For example, appellant contends that over 1,600 voters were assigned to the Grove Place voting district, which operated to retard rather than facilitate the voting process, because of lengthy delays).
>
> **18 V.I.C. § 196:** Concerns "Equipment and arrangement of polling places . . ." and provides at (b) that: "The number of voting compartments or booths to be set up in each polling place shall not be less than one for every 100 voters or fraction thereof, and in no case less than three."
> (Respondent concedes Appellant's contention that this section was violated because insuf-

> ficient numbers of electronic machines were provided at the polling places).
>
> **18 V.I.C. § 505: Entitled "Instruction to electors,"** provides, in part, that 'the Supervisor of Elections shall provide at each polling place one instruction model illustrating the manner of voting with the system.
> (It is conceded that no instruction models of the electronic voting machines were provided).

Here, although the language of the statute is not ambiguous, the trial court found that the plain and ordinary meaning of the statute was not intended by the legislature. The Court determined that the word "shall," as used in the statutory scheme and the sections of the V.I. Election Laws that were violated is "directory because [the sections] do not go to the merits of the election and are intended to merely regulate the conduct of the election." Opinion at 8. Appellant contends that the court erred in this construction of the Virgin Islands Election Laws Statute.

In making its determination the trial court noted the following factors to be considered:

> a) Whether the statutory scheme expressly or impliedly provides that failure to follow the provision shall render the election void;
>
> b) Whether the failure interfered in any way with the result of the election;
>
> c) whether any person legally entitled to vote was not permitted to do so;

> d) whether the polling place was chosen for an improper motive;
>
> e) Whether any fraud occurred in or as a result of the selection of the improper method.

Opinion at 7, *Citing Write-in Adelbert appellant Committee and Adelbert appellant v. Joint Board of Election of the V.I. et al., and the 17th Legislature*, Civ. No. 976/1988 (Terr. Ct. St. Croix, Jan. 20, 1989) *quoting* (*Cahn*, 218 N.E. 2d at 836). However, the trial court, while noting these factors, did not address them individually. The court reasoned that the sections "are all directory because they do not go to the merits of the election and are [merely] intended to regulate the conduct of the election." Opinion at p.8. The trial court also found persuasive the fact that "none of these statutes provide[s] that a failure to adhere to its provisions shall render an election void." *Id.*

From the above, it appears that the trial court found no reason to disregard the general rule with respect to construing election statutes that they are to be given a construction that would insure rather than defeat the exercise of the right of duly qualified voters. *See Generally*, 29 C.J.S. Elections, § 7(4), p. 44. It is for this reason that "[e]lection laws are, as a general rule, considered to be merely directory,

even though mandatory in form." Id. at p. 45. One court's fidelity to this maxim led it to announce that:

> before an election is held statutory provisions regulating the conduct of the election will usually be treated as mandatory and their observance may be insisted upon and enforced. * * * "After an election has been held, the statutory regulations are [however], generally construed as directory . . ."

George Green and Others v. Independent Consolidated School District No. 1, Lyon County, 89 N.W. 2d 12, 16 (Minn. S.Ct. 1958)(citations omitted).

Whether the use of the word "shall" is deemed mandatory or directory after an election, may depend on the particular factual circumstances of the case. We cannot say that the trial court erred in interpreting "shall" in the "directory" sense in this instance. On the other hand, looking at the factors the trial court purportedly considered, neither can we say that no right or benefit to the elector depends on these statutory provisions being taken in the imperative sense, for in other circumstances failure to follow the statutory mandate may operate to deny the electors a fair and free expression of their will.

It is true, as the trial court pointed out, that the use of the word "shall" by a legislature, though a fundamental textual consideration, is not dispositive of legislative intent. However, with respect to interpreting election laws, it is the

"will" of the voter and not the legislature that is of paramount importance. This is because election laws are enacted not to condition the right of the elective franchise but to regulate the exercise of the right in an orderly way. It is for this reason, that it is universally recognized that the purpose of these statutes is to insure a fair election or to afford an equal chance and opportunity for the qualified elector to express his/her choice at the polls; that is to prevent fraud, corruption, and mistake. *See* 29 C.J.S. Elections, § 7, p.44-45.

Turning to the instant provisions, concededly disregarded, there is no legislative history to which we may look to divine legislative intent or for guidance in their interpretation. However, in the absence of clear legislative intent, a rule of construction of this jurisdiction provides that we look to the construction given to the statute from the jurisdiction from which it was adopted. The annotated code states that the source of these particular provisions is Purdon Pennsylvania Statutes.

The Pennsylvania Supreme Court directs that in resolving election controversies it would not be amiss to consider the following criteria:

1. Was any specific provision of the Election Code violated?

2. Was any fraud involved?

> 3. Was the will of the voter subverted?
>
> 4. Is the will of the voter in doubt?
>
> 5. Did the loser suffer an unfair disadvantage?
>
> 6. Did the winner gain an unfair disadvantage?

Appeal of James, 105 A.2d 64, 66, 377 Pa. 405 (1954)

As to factor one, we must answer yes, because aside from the trial court's independent finding of facts, the parties have conceded that certain sections of the statute were violated. However, as to the remaining five factors, the answer must be in the negative.

In construing claims of non compliance with similarly worded provisions, the Supreme Court of Pennsylvania, in *Appeal of James*, observed that:

> even if it were to be said that a minor irregularity was involved, it is not apparent that such a fleeting and fortuitous flaw could invalidate the strikingly clear intent of the voter
>
> * * *
>
> The power to throw out a ballot for minor irregularities, like the power to throw out the entire poll of an election district for irregularities, must be exercised very sparingly and with the idea in mind that either an individual voter or a group of voters are not to be disfranchised at an election except for compelling reasons * * * 'The purpose in holding elections is to register the actual expression of the electorate's will' and that 'computing judges' should endeavor 'to see

> what was the true result.' There should be the same reluctance to throw out a single vote as there is to throw out an entire district poll, for sometimes an election hinges on one vote.

105 A.2d 64, 66, 377 Pa. 405 (1954), citing *Case of Bauman Election Contest*, 351 Pa. 451, 454-455, 41 A.2d 630, 632.

Here, the irregularities were numerous, but not of a character as to cast doubt upon the outcome of the vote, and thus not sufficiently substantial to warrant nullification of the election.

We are reluctant to conclude, as did the trial court, that "shall" as used in the statutory scheme governing the election process is directory and never to be construed in its primary and ordinary sense. However, neither do we suggest that noncompliance with these provisions ineluctably leads to invalidation of the vote. Limited to the facts of this case, where there is no allegation of fraud, where the actual expression of the electorate has not been subverted and where there was no significant impairment of any public or private right, we find the trial court's interpretation of the statutory language was not improper.

We note further, that compliance with these statutory provisions is not at the discretion of the election officials. The record is replete with evidence illustrating the rather "laissez faire" approach of the Joint Board of Elections to the statutory mandate. Both the Joint Board of Elections and the Supervisor of Elections have a statutory duty to conduct elections in accordance with the statutory mandate. This appellant failed to present evidence of a clear and convincing nature that the integrity of the electoral process was affected by the numerous irregularities. We recognize, however, that such irregularities may, under other circumstances, result in subverting the free expression of the voters' will. Because of this concern, continued disregard of **any** statutory directives by the Joint Board of Elections will receive the closest scrutiny.

For the reasons stated above the decision of the trial court will be affirmed, and an order entered.

FOR THE COURT

Thomas K. Moore, Presiding Judge

A T T E S T:
ORINN F. ARNOLD
Clerk of the Court
BY: